

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

EVERARD F. KING,	)	
	)	No. CV-06-0086-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR
LINDA S. McMAHON, <sup>1</sup>	)	ADDITIONAL PROCEEDINGS
Commissioner of Social	)	PURSUANT TO SENTENCE
Security,	)	FOUR 42 U.S.C. § 405(g)
	)	
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 16). Attorney D. James Tree represents Plaintiff; Assistant United States Attorney Pamela DeRusha and Special Assistant United States Attorney David Burdett represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for

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<sup>1</sup> As of January 20, 2007, Linda S. McMahon succeeded Defendant Commissioner Jo Anne B. Barnhart as Acting Commissioner of Social Security,. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Linda S. McMahon should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. 405 (g).

1 Summary Judgment and remands the matter to the Commissioner for  
2 additional proceedings pursuant to sentence four of 42 U.S.C.  
3 405(g).

4 Plaintiff was 63 years old at the time of the administrative  
5 hearing. (Tr. 18.) He previously filed applications for disability  
6 benefits in 1975, 1993, and 1999, which were denied and not  
7 appealed. There was no request to reopen those decisions. (Id.)  
8 Plaintiff re-filed applications for disability benefits and for  
9 Supplemental Security Income benefits on April 17, 2002, alleging  
10 disability as of March 1, 2001, due to emphysema, heart murmur,  
11 chronic obstructive pulmonary disease (COPD) and supraventricular  
12 tachycardia (SVT). (Tr. at 57, 110, 268.) At the time of the  
13 hearing, his medications included blood pressure medicine, Ramipril  
14 for his heart, prescription strength ibuprofen, reflux medicine  
15 (ranitidine), Zoloft, Combivent and albuterol for COPD. (Tr. 291-  
16 92.) Plaintiff had a ninth-grade education and past relevant work  
17 as a long haul truck driver for over 16 years. (Tr. 79, 280.)  
18 Following a denial of benefits at the initial stage and on  
19 reconsideration, a hearing was held before Administrative Law Judge  
20 (ALJ) Verrell Dethloff. On January 24, 2005, the ALJ denied  
21 benefits; review was denied by the Appeals Council. This appeal  
22 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §  
23 405(g).

#### 24 ADMINISTRATIVE DECISION

25 The ALJ found Plaintiff was insured for benefits through the  
26 date of the decision. At step one, he found Plaintiff had not  
27 engaged in substantial gainful activity. He determined Plaintiff  
28 had the impairments of alcoholism, hypertension, COPD, occasional

1 back pain and a history of tachycardia.<sup>2</sup> (Tr. at 23.) At step three  
2 he found, "[t]he claimant does not have any impairments or  
3 impairments that significantly limit his ability to perform basic  
4 work-related activities; therefore, the claimant does not have a  
5 severe impairment." (Tr. 24.) He concluded Plaintiff was not  
6 disabled at any time through the date of the decision. (Id.)

#### 7 ISSUES

8 The question presented is whether there was substantial  
9 evidence to support the ALJ's decision denying benefits and, if so,  
10 whether that decision was based on proper legal standards.  
11 Plaintiff contends the ALJ erred when he (1) denied Plaintiff's  
12 claim at step two, and (2) failed to fully develop the record as to  
13 Plaintiff's impairments.

#### 14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
16 court set out the standard of review:

17 The decision of the Commissioner may be reversed only if  
18 it is not supported by substantial evidence or if it is  
19 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
20 1097 (9<sup>th</sup> Cir. 1999). Substantial evidence is defined as  
being more than a mere scintilla, but less than a  
preponderance. *Id.* at 1098. Put another way, substantial

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21 <sup>2</sup> Tachycardia is the "rapid beating of the heart, usually  
22 applied to rates of 100 beats per minute." *Stedman's Medical*  
23 *Dictionary*, (25<sup>th</sup> ed. 1990). Supraventricular tachycardia (SVT) is  
24 a general term that "describes a number of different arrhythmias of  
25 the heart, each with a different mechanism of impulse maintenance."  
26 *Wikipedia Encyclopedia*, found at [www.en.wikipedia.org](http://www.en.wikipedia.org). Symptoms  
27 include dizziness or fainting, shortness of breath, anxiety and  
28 weakness in the legs. *Id.*

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from

1 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
2 404.1512(a)-(b), 404.1513(d)).

3 **STEP TWO**

4 At step two of the sequential process, the ALJ must conclude  
5 whether Plaintiff suffers from a "severe" impairment, one which has  
6 more than a slight effect on the claimant's ability to work. To  
7 satisfy step two's requirement of a severe impairment, the claimant  
8 must prove the existence of a physical or mental impairment by  
9 providing medical evidence consisting of signs, symptoms, and  
10 laboratory findings; the claimant's own statement of symptoms alone  
11 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms  
12 must be evaluated on the basis of a medically determinable  
13 impairment which can be shown to be the cause of the symptoms. 20  
14 C.F.R. §§ 404.1529, 416.929. Once medical evidence of an underlying  
15 impairment has been shown, medical findings are not required to  
16 support the alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d  
17 341, 345 (9th Cir. 1991). However, an overly stringent application  
18 of the severity requirement violates the statute by denying benefits  
19 to claimants who do meet the statutory definition of disabled.  
20 *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the  
21 Commissioner has passed regulations which guide dismissal of claims  
22 at step two. Those regulations state an impairment may be found to  
23 be "non-severe" only when evidence establishes a "slight  
24 abnormality" that has "no more than a *minimal effect* on an  
25 individual's ability to work." *Id.* (citing *Social Security Ruling*  
26 (SSR) 85-28). The ALJ must consider the combined effect of all of  
27 the claimant's impairments on the ability to function, without  
28 regard to whether each alone was sufficiently severe. See 42 U.S.C.

1 § 423(d)(2)(B)(Supp. III 1991). The step two inquiry is a *de*  
2 *minimis* screening device to dispose of groundless or frivolous  
3 claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987).

4 The adjudicator's role at step two is further explained by SSR  
5 85-28:

6 A determination that an impairment(s) is not severe  
7 requires a careful evaluation of the medical findings  
8 which describe the impairment(s) and an informed judgment  
9 about its (their) limiting effects on the individual's  
10 physical and mental ability(ies) to perform basic work  
11 activities; thus, an assessment of function is inherent in  
12 the medical evaluation process itself. At the second step  
13 of sequential evaluation, then, medical evidence alone is  
14 evaluated in order to assess the effects of the  
15 impairment(s) on ability to do basic work activities.

16 . . . .

17 If . . . evidence shows that the person cannot perform his  
18 or her past relevant work because of the unique features  
19 of that work, a denial at the "not severe" step of the  
20 sequential evaluation process is inappropriate. The  
21 inability to perform past relevant work in such instances  
22 warrants further evaluation of the individual's ability to  
23 do other work considering age, education and work  
24 experience.

25 SSR 85-28.

26 Here, the ALJ found Plaintiff's significant impairments of  
27 alcoholism, hypertension, chronic obstructive pulmonary disease,  
28 back pain and a history of tachycardia, alone or in combination, did  
not cause more than minimal limitations in his ability to work.  
(Tr. 23.) The ALJ rejected treating physician's opinions that the  
Plaintiff's condition caused marked and severe limitations; however,  
the evidence is sufficient to satisfy the "*de minimis*" threshold at  
step two. *Webb v. Barnhart*, 433 F.3d 683, 687 (2005). Further,  
the Ninth Circuit has held that where the objective evidence is  
incomplete, the ALJ has a duty to supplement the record before  
rejecting a claimant's application so early in the evaluation

1 process. (Id.)

2 **A. Medical Evidence**

3 In a disability proceeding, the treating physician's opinion is  
4 given special weight because of his familiarity with the claimant  
5 and the physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05  
6 (9th Cir. 1989). If the treating physician's opinions are not  
7 contradicted, they can be rejected only with "clear and convincing  
8 reasons." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If  
9 contradicted, the ALJ may reject the opinion if he states specific,  
10 legitimate reasons that are supported by substantial evidence. See  
11 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463  
12 (9th Cir. 1995); *Fair*, 885 F.2d at 605.

13 Uncontradicted, objective medical evidence clearly shows  
14 Plaintiff's treating physicians diagnosed SVT and COPD, serious  
15 medical conditions that required treatment, including medication.  
16 Plaintiff was diagnosed with SVT and alcohol dependence by the  
17 emergency room physician at Phoenix Memorial Hospital 1998. (Tr.  
18 34-37.) Reports from the CHAS clinic in Spokane, Washington, dated  
19 April to May 2001, indicate medical providers assessed Plaintiff  
20 with SVT, alcohol abuse and hypertension. (Tr. 236-42.) Plaintiff  
21 was treated with prescribed medications. At the time of his May  
22 2001 exam, Plaintiff was not experiencing significant SVT symptoms;  
23 however, the medical provider warned him of the necessity of going  
24 to ER if his symptoms worsened. (Tr. 242.)

25 In January 2002, Plaintiff was seen at the Pasco, Washington,  
26 Community Health Center by Eduardo Vides, M.D. Dr. Vides opined  
27 Plaintiff suffered from SVT (a severe impairment), left hip pain,  
28 COPD and a superior mediastinal mass (a severe impairment) that

1 needed further diagnostic tests. (Tr. 232.) He noted on the report  
2 that Plaintiff's SVT condition could cause "sudden death." (Tr.  
3 233.) No evidence of record contradicts this opinion.

4 In February and March 2002, Plaintiff was seen at the Southwest  
5 Washington Medical Center emergency room in Vancouver, Washington,  
6 where a medical history of SVT, hypertension, pulmonary disease,  
7 alcohol abuse and smoking were noted. Plaintiff was treated with  
8 medication for hypertension and SVT. (Tr. 164, 166-67, 182.) In  
9 April 2002, Plaintiff was seen at Central Washington Hospital  
10 (Wenatchee) emergency room for SVT episodes that resolved  
11 themselves; the attending physician noted high blood pressure and  
12 alcohol intoxication. (Tr. 192-93.) Plaintiff was advised to  
13 return to detox with his blood pressure medicine. (Tr. 199.)

14 Vivek Shah, M.D., treated Plaintiff at the Yakima, Washington,  
15 Health Center from August 17, 2002, to July 29, 2004. (Tr. 212-213,  
16 243-264.) Clinical notes indicate an ongoing treatment relationship  
17 in which Dr. Shah counseled Plaintiff on depression, the need to  
18 stop smoking and maintain his alcohol abstinence. (Tr. 213-14.)  
19 Plaintiff was being treated for hypertension, COPD,<sup>3</sup> SVT and  
20 depression with a variety of medicines, some of which had caused  
21 problems in combination. (Id.) Plaintiff reported no drinking for  
22 the last 15 months. He did not have a stable residence. (Tr. 214.)  
23 Plaintiff reported having SVT attacks "about once a week." Dr. Shah  
24 advised him to go to ER immediately if he experienced shortness of  
25 breath, chest pain or diaphoresis. (Tr. 258.)

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27 <sup>3</sup> Pulmonary tests indicated mild obstructive impairment. (Tr.  
28 216.



1 In September 2002, Plaintiff reported a flare up of COPD due to  
2 wildfires in the area. Dr. Shah treated him with medication. (Tr.  
3 257.) In December 2002, Dr. Shah assessed Plaintiff with moderate  
4 impairments due to depression and hypertension, and marked  
5 impairment due to his COPD. (Tr. 230.) He opined Plaintiff should  
6 be limited to a sedentary level of exertion. (Tr. 213.) From May  
7 2003 to August 2004, Dr. Shah treated Plaintiff for hypertension,  
8 depression and respiratory problems. (Tr. 251-55.) In July 2004,  
9 Plaintiff reported episodes of SVT which he was able to resolve by  
10 medically recommended methods.<sup>4</sup> (Tr. 250.)

11 An attempt to complete a residual functional capacity  
12 assessment in September 2002, by agency physician George Rodkey,  
13 M.D., was unsuccessful due to Plaintiff's failure to attend the  
14 assessment. (Tr. 209.) There are no other agency assessments in  
15 the record for the claimed period of disability.

16 The regulations reflect "[g]reat care should be exercised in  
17 applying the not severe impairment concept." SSR 85-28.  
18 Recognizing the narrow construction of the severity regulation, the  
19 Ninth Circuit has held that unless there is affirmative evidence of  
20 malingering, an ALJ's reasons for rejecting a claimant's allegations  
21 at step two must meet the "clear and convincing" standard, when  
22 balanced against the treating physician opinions, objective tests  
23 and Plaintiff's subjective complaints. *Webb*, 433 F.3d at 687; see  
24 also *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). Here,  
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26 <sup>4</sup> Plaintiff explained at the hearing that to stop his rapid  
27 heartbeat, he was instructed by his doctor to go to the toilet and  
28 bear down.

1 there is no evidence of malingering. Plaintiff testified that he  
2 stopped driving trucks due to pain and arthritis in his back and  
3 knees. He stated the last time he was driving a truck, he fell  
4 asleep and ran into a ditch, and he was "worn out." (Tr. 281, 291.)  
5 He testified he was experiencing SVT attacks and dizziness almost  
6 every day over the last few weeks. (Tr. 285.) As noted above, to  
7 stop the rapid heart beats, Plaintiff must have access to a toilet  
8 where he can bear down.

9 The ALJ's reliance on Plaintiff's earnings report and inability  
10 to completely stop smoking as bases for rejecting this testimony is  
11 insufficiently "clear and convincing" to discredit Plaintiff's  
12 complaints and allegations at step two. (Tr. 21-22.) Crediting  
13 the medical opinions that Plaintiff suffered SVT, Plaintiff's  
14 testimony, his documented complaints of dizziness and SVT episodes,  
15 and the ALJ's finding that Plaintiff's SVT was a nocturnal  
16 affliction, the evidence is not conclusive that Plaintiff can  
17 perform his past work as a long haul truck driver.<sup>5</sup> Without clear  
18 and convincing evidence that Plaintiff could perform his past work,  
19 denial of benefits at step two is inappropriate. SSR 85-28.

## 20 **B. Development of the Record**

21 The ALJ's duty to supplement the record is triggered by  
22 ambiguous evidence or when the record is inadequate to properly  
23 evaluate the evidence. *Mayes v. Massanari*, 276 F.3d 453, 4509-60  
24 (9<sup>th</sup> Cir 2001) (*citing Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9<sup>th</sup>

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26 <sup>5</sup> According to the DICTIONARY OF OCCUPATIONAL TITLES (DICOT), Tractor-  
27 Trailer Truck Driver (904.383-010) is classified as medium work.  
28 DICOT, 4<sup>th</sup> ed., revised 1991.

1 Cir. 2001)). As noted by the ALJ, the reasons for Dr. Shah's  
2 opinion that Plaintiff was disabled were ambiguous. (Tr. 22.) The  
3 evidence also establishes Plaintiff was being treated by a variety  
4 of prescribed medications. There is no testimony or report  
5 explaining the purpose of specific medications and what, if any, the  
6 combined side effects had on Plaintiff's functioning. Further, the  
7 ALJ did not order supplemental examinations from cardiac or  
8 pulmonary specialists or use a medical expert to evaluate the  
9 severity or limitations caused by these conditions separately or in  
10 combination. Although a severity assessment by agency physicians  
11 was attempted in September 2002, no evidence was obtained. (Tr.  
12 209.) Where additional evidence is needed to determine the  
13 limitations caused by an impairment, the ALJ should order additional  
14 consultative examinations. 20 C.F.R. §§ 404.1527(c)(3), 416.  
15 1527(c)(3); *Brown v. Heckler*, 713 F.2d 441, 443 (9<sup>th</sup> Cir. 1983)(to  
16 assure claimant's interests are considered, special duty exists to  
17 fully and fairly develop record). Without additional evidence, a  
18 finding at step two of "not disabled" is error. (Tr. 22.)  
19 Accordingly,

20 **IT IS ORDERED:**

21 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
22 **GRANTED**. The matter is remanded to the Commissioner for additional  
23 proceedings pursuant to 42 § U.S.C. 405(g).

24 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
25 **Rec. 16**) is **DENIED**.

26 3. Application for attorney fees may be made by separate  
27 motion.

28 The District Court Executive is directed to file this Order and

1 provide a copy to counsel for Plaintiff and Defendant. The file  
2 shall be **CLOSED** and judgment entered for **Plaintiff**.

3 DATED January 29, 2007.

4  
5 S/ CYNTHIA IMBROGNO  
6 UNITED STATES MAGISTRATE JUDGE  
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